No. 13056.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. PAUL OLINGER and RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General, United States of America, Commanding General, Camp Roberts, California,

Appellee.

On Appeal From the United States District Court for the Southern District of California Central Division

Hon. Harry C. Westover, Judge.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

On March 5, 1951, in the United States District Court, in and for the Southern District of California, Central Division, appellants filed a petition for writ of *habeas corpus* seeking the release of appellant A. Paul Olinger from military service [Tr. p. 3]. The particular grounds thereof are set out in detail in the petition [Tr. pp. 3-8], and briefly they are:

(1) Appellant A. Paul Olinger was before and at the time of his draft and actual induction into the military

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I.

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On March 5, 1951, in the United States District Court, in and for the Southern District of California, Central Division, appellants filed a petition for writ of *habeas corpus* seeking the release of appellant A. Paul Olinger from military service [Tr. p. 3]. The particular grounds thereof are set out in detail in the petition [Tr. pp. 3-8], and briefly they are:

(1) Appellant A. Paul Olinger was before and at the time of his draft and actual induction into the military

service of the United States on February 6, 1951, an officer in the United States Merchant Marine, and a licensed first assistant engineer of steam vessels under Chapter 11, Title 46, *United States Code;* and therefore his said draft and induction were contrary to the provisions of 46 *USCA,* Chapter 11, Sec. 225, which provides, among other things, that [Tr. pp. 3-4],

> ". . . No . . . engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license . . ."

(2) First assistant engineer ship officers were and now are included in the list of critical occupations eligible for draft deferment [Tr. p. 4].

(3) The draft board acted and proceeded arbitrarily, denied appellant A. Paul Olinger a fair hearing and due process, and acted without or in excess of jurisdiction [Tr. pp. 4-7].

On March 29, 1951, said District Court issued its order to show cause why writ of *habeas corpus* should not issue [Tr. p. 9].

On April 14, 1951, appellee filed its return to order to show cause why writ of *habeas corpus* should not issue. The particulars thereof are set out in detail in said return [Tr. pp. 10-26], but reference thereto will be made briefly to certain allegations thereof. They are as follows:

(1) Appellant A. Paul Olinger was drafted and inducted into the Army of the United States on February 6, 1951 [Tr. pp. 10, 12-13, 21].

(2) Appellant A. Paul Olinger has not yet been assigned to duties such as required by his license as a first assistant engineer officer in the United States Merchant Marine [Tr. p. 11].

(3) 46 *USCA,* Chapter 11, Section 225, has been superseded by Section 17 of the *Selective Service Act* of 1948 (50 *U.S.C., War Appendix,* Sec. 467) [Tr. p. 12].

(4) The Selective Service Act of 1948 provides no authority for deferment or exemptions of merchant seaman, and cites Section 454, Title 50, *USCA,* Subsection (a) in support of said contention [Tr. p. 13].

(5) On October 8, 1948, the draft board classified appellant A. Paul Olinger as 1-A and written notice of said classification (*SSS Form 110*) was mailed to him on October 11, 1948, which contained a notice of his right to appeal therefrom or file a written request for personal appearance before the local board within ten days after the mailing of the notice [Tr. pp. 13-14, 16, 22-23].

(6) During the years 1948 and 1949, appellant A. Paul Olinger made no effort to appear and discuss his classification with the draft board, to present new information or to discuss his classification on the basis of information already on file [Tr. p. 14].

(7) Appellant A. Paul Olinger did not take any appeal nor filed any oral or written request for personal appearance before the local board [Tr. p. 19].

(8) Appellant A. Paul Olinger appeared in person at the local board on or about August 11, 1950, which was

about seven days after notice to report for physical examination on August 15, 1950, was mailed to him [Tr. p. 19].

(9) No facts or new information, which, if true, would justify a change in appellant A. Paul Olinger's classification, has ever been submitted to the local board [Tr. pp. 19-20].

(10) The local board is and was well aware of the fact that appellant A. Paul Olinger had served and was now serving in the Merchant Marine as a duly licensed assistant engineer [Tr. p. 20].

(11) On September 7, 1950, an induction order was mailed to appellant to report for induction on September 18, 1950.

Petitioner's Exhibit No. 1 contains a United States Department of Labor second addition to initial list of critical occupations dated August 3, 1950, which includes first assistant engineers who are eligible for draft deferment [Tr. pp. 27-31 at p. 31].

On June 21, 1951, said District Court made an order dismissing the petition for writ of *habeas corpus,* and discharging the order to show cause issued herein, for lack of jurisdiction of said court to hear said matter on its merits [Tr. pp. 32-33, 38]. The order, decree or judgment was entered on June 22, 1951 [Tr. p. 33] from which this appeal was taken on July 11, 1951 [Tr. pp. 33-34].

At the time the petition was filed appellant A. Paul Olinger was detained of his liberty by the Commanding General of Camp Roberts, a United States Army/Mili-

tary Camp, in the County of San Luis Obispo, State of California,, which is within the jurisdiction of the United States District Court, Southern District of California, Central Division, and the petition for writ of *habeas corpus* was filed in said District Court (New Title 28, *United States Code,* Sec. 2242).

Writs of *habeas corpus* may be granted by the District Court within their respective jurisdiction (New Title 28, *United States Code,* Sec. 2241).

In a *habeas corpus* proceedings before a District Court Judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the Circuit where the proceeding is had, in this case in and for the Ninth Circuit (New Title 28, *United States Code,* Sec. 2253).

The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law of the United States (*R. S.,* Sec. 753, 28 *United States Code,* Sec. 453).

II.
Statement of the Case.

This matter came on regularly for hearing on the order to show cause why a writ of *habeas corpus* should not issue, on April 16, 1951, in said District Court, Honorable Harry C. Westover, judge presiding. At that time the court requested briefs of counsel on the question of whether or not the court had jurisdiction to hear this cause on its merits, because appellant A. Paul Olinger had not taken an administrative appeal from his draft board classification of 1-A with which he was dissatisfied, as provided by the Selective Service Act and Regulations issued pursuant thereto. Pursuant to such request counsel filed their respective briefs with said court.

On June 21, 1951, said District Court made an order, judgment or decree dismissing the petition for writ of *habeas corpus,* and discharging the order to show cause issued in this cause, for lack of jurisdiction to hear this matter on its merits [Tr. pp. 32-33]. The order, judgment or decree was entered on June 22, 1951 [Tr. p. 33], from which this appeal was taken on July 11, 1951 [Tr. pp. 33-34].

III.
Question Involved.

The sole question therefore presented by this appeal is whether appellant A. Paul Olinger who had not taken an administrative appeal from his classification by the local board, but had undergone actual induction into the military service, may by *habeas corpus* proceedings obtain a judicial review of the legality of his classification and induction.

IV.

Specifications of Error.

On this appeal appellants rely upon the following statement of points which are set out also in the Transcript of Record, pages 40-41.

I.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and the Draft Board acted in violation of due process of law, because appellant did not exhaust his administrative remedies under the Selective Service Act in that he failed to take the administrative appeals provided under said Act.

II.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and said findings and order were in violation of the provisions of 46 *USCA,* sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

III.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the legality of appellant's detention in the military service of the United States when and where he is being detained contrary to and in violation of the provisions of 46 *USCA,* sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

V.
Summary of Argument.

I.

A draftee who has undergone induction into the military service, may by *habeas corpus* proceedings, obtain a judicial review of the legality of his classification and induction on the grounds that his local draft board acted in excess of its jurisdiction, arbitrarily, and in violation of due process of law, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board.

II.

A draftee who has undergone induction into the military service, may by *habeas corpus* proceedings, obtain a judicial review of the legality of his classification and induction on the grounds that such classification and induction were in violation of the provisions of 46 USCA, sec. 225, Chapter 11, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board.

III.

A draftee who has undergone induction into the military service, may by *habeas corpus,* obtain a judicial review of the legality of his detention in the military service of the United States on the grounds that he is being detained contrary to and in violation of the provisions of 46 *USCA,* sec. 225, Chapter 11, even though prior to his induction the draftee failed to take an administrative appeal from his classification by the local board.

VI.
ARGUMENT.

I.

A Draftee Who Has Undergone Induction Into the Military Service, May by Habeas Corpus Proceedings, Obtain a Judicial Review of the Legality of His Classification and Induction on the Grounds That His Local Draft Board Acted in Excess of Its Jurisdiction, Arbitrarily, and in Violation of Due Process of Law, Even Though Prior to His Induction the Draftee Failed to Take an Administrative Appeal From His Classification by the Local Board.

It is conceded appellant failed to take any of the administrative appeals provided by the Selective Service Act and the Regulations issued pursuant thereto. However, appellant contends this is immaterial. Since he had undergone actual induction into the military service, questions of procedure under the Selective Service Act and the Selective Service Regulations issued pursuant thereto are thereby avoided, and appellant may by *habeas corpus* proceedings challenge the legality of his classification and induction, particularly where the challenge is made on jurisdictional and constitutional grounds.

The sole question therefore presented by this appeal is whether appellant who had not taken an administrative appeal from his classification by the local board, but had undergone actual induction into the military service, may by *habeas corpus* proceedings, obtain a judicial review of the legality of his classification and induction.

The mobilization system which Congress established by the Selective Service Act of 1948, is designed to operate as one continuous process for the selection of men for national service. After the initial steps in the process had been taken the registrant is classified in accordance with the standards contained in the Act and the Selective Service Regulations. The local board then notifies him of his classification. The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President. But a registrant is not required under the Act and Regulations to take the administrative appeals. He may waive or abandon it; and if he does he has exhausted those particular intermediate steps in the Selective Service procedure, and only after he has exhausted those particular steps, either by waiver or abandonment, or by pursuing the remedy to the very end, is a protesting registrant ordered to report for service. When he is ordered to report for service the registrant must obey the order, and but such order is not the equivalent of acceptance for service. The connected series of steps in the Selective Service process does not end until the registrant is finally accepted for service.

When a registrant has been finally accepted for military service, but refuses to submit to induction, in a criminal action for refusing to submit to induction, the registrant is entitled to judicial review of the propriety of his classification by the local board even though he failed to take

an administrative appeal from said classification. The following cases, in appellants' opinion, support the views herein expressed:

Falbo v. United States, 320 U. S. 549;

Billings v. Truesdell, 321 U. S. 542;

Estep v. United States, 327 U. S. 114;

Gibson v. United States, 329 U. S. 338;

United States v. Downer, 135 F. 2d 521.

In *Falbo v. United States, supra,* pages 550, 554, Falbo was criminally charged with having wilfully failed to obey the board's order to report. The court held:

> ". . . Congress was not required to provide for judicial intervention before final acceptance of an individual for national service . . ."

In *Billings v. Truesdell, supra,* pages 545, 558, Billings filed a petition for a writ of *habeas corpus* alleging he was not actually inducted in the service and that he was amenable to the civil laws of the Unites States and not subject to military jurisdiction. The court held:

> "* * * Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies, . . ."

In *Estep v. United States, supra,* pages 115-116, Estep reported for induction, was finally accepted, but refused to submit to induction. The court said:

> "We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services;
>
> *"Falbo v. United States, supra,* does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of the local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remendies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them;"

In the present case appellant was not only accepted for service, but that also he has undergone actual induction into the military service. The orders of the local board have been satisfied, and there are no further steps in the Selective Service process which he can take to obtain relief from them. Appellant contends that he has exhausted the Selective Service procedure even though he had waived the intermediate step of an administrative appeal, and he is therefore entitled to judicial review of the propriety of his classification by the local board and of the legality of his induction.

Furthermore, since appellant has undergone actual induction, questions of exhaustion of Selective Service procedure such as have arisen in the *Falbo, Estep* and *Gibson* cases are here avoided, and appellant may by *habeas corpus* proceedings obtain a judicial review of the legality of his classification and induction.

In *Estep v. United States, supra,* pages 123-124, the court said:

> "The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law . . . of the United States . . . R. S. sec. 753, 28 United States Code, sec. 453. It has been assumed that *habeas corpus* is available only after a registrant has been inducted into the armed services."

In *Gibson v. United States, supra,* pages 359-360, the court said: "It sas been clearly established that the remedy by way of *habeas corpus* is open to the wrongfully inducted member of the armed forces to secure his release." (Consult cases cited in notes 23, 24, 36.)

In *United States v. Downer, supra,* page 522, the court said:

> "Since the draftee has, therefore, obeyed the law by responding to the call for induction and has relied upon the writ of *habeas corpus* to test his legal rights, questions of procedure such as have arisen in cases of a similar nature are here avoided and he has placed himself in the proper position to challenge the legality of his induction."

Even if it be assumed for purposes of argument appellant may not obtain a judicial review of the propriety of his classification by *habeas corpus* proceedings because he had not taken the administrative appeal from his classification (which, of course, appellant does not concede) such questions of Selective Service procedure are avoided where appellant, after having undergone actual induction,

In *Estep v. United States, supra,* pages 115-116, Estep reported for induction, was finally accepted, but refused to submit to induction. The court said:

> "We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services;
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> "*Falbo v. United States, supra,* does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of the local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remendies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them;"

In the present case appellant was not only accepted for service, but that also he has undergone actual induction into the military service. The orders of the local board have been satisfied, and there are no further steps in the Selective Service process which he can take to obtain relief from them. Appellant contends that he has exhausted the Selective Service procedure even though he had waived the intermediate step of an administrative appeal, and he is therefore entitled to judicial review of the propriety of his classification by the local board and of the legality of his induction.

Furthermore, since appellant has undergone actual induction, questions of exhaustion of Selective Service procedure such as have arisen in the *Falbo, Estep* and *Gibson* cases are here avoided, and appellant may by *habeas corpus* proceedings obtain a judicial review of the legality of his classification and induction.

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Even if it be assumed for purposes of argument appellant may not obtain a judicial review of the propriety of his classification by *habeas corpus* proceedings because he had not taken the administrative appeal from his classification (which, of course, appellant does not concede) such questions of Selective Service procedure are avoided where appellant, after having undergone actual induction,

by *habeas corpus* proceedings, challenges the legality of his classification and induction on jurisdictional and constitutional grounds.

In *Estep v. United States, supra,* page 123, the court said:

> "The remedy of *habeas corpus* extends to a case where a person is in custody in violation of the Constitution or of a law . . . of the United States . . . R. S. sec. 753, 28 United States Code, sec. 453."

In *Skinner & Eddy Corp. v. United States,* 249 U. S. 557, 39 S. Ct. 375, 377, 63 L. Ed. 772, the Interstate Commerce Commission had issued a rate order which the plaintiff attacked as lacking a statutory authority. It was there contended that plaintiff should have sought administrative review. The court said, "But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the commission. The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission."

Consult the following cases to the same effect:

Koepke v. Fontecchio, 177 F. 2d 125, 128;

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 107-110;

Gegiow v. Uhl, 239 U. S. 3, 9;

Stark v. Wickard, 321 U. S. 288, 307-311;

Ng Fung Ho v. White, 259 U. S. 276, 284.

II.

A Draftee Who Has Undergone Induction Into the Military Service, May by Habeas Corpus Proceedings, Obtain a Judicial Review of the Legality of His Classification and Induction on the Grounds That Such Classification and Induction Were in Violation of the Provisions of 46 USCA, Sec. 225, Chapter 11, Even Though Prior to His Induction the Draftee Failed to Take an Administrative Appeal From His Classification by the Local Board.

46 *USCA,* sec. 225, Chapter 11, provides, among other things, that "No . . . engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license."

In the District Court appellee argued that the above section was suspended by Section 17 of the Selective Service Act of 1948 (50 *United States Code, War Appendix,* sec. 467), and that the Selective Service Act of 1948 (50 *USCA,* sec. 454(a)) provides no authority for appellant's deferment or exemption. This argument was on the merits and this question is, therefore, not before the court.

The sole question presented by this appeal under this argument is whether appellant who had not taken the administrative appeal from his classification before he was inducted into the service, may, after his induction, by *habeas corpus* proceedings, obtain judicial review of the legality of his classification and induction, particularly on jurisdictional and constitutional grounds. And appellant's argument hereunder will be limited to this question.

In this argument the issue is solely one which involves an interpretation of 46 *USCA,* sec. 225, Chapter 11, with the Selective Service Act of 1948. As 46 *USCA,* sec. 225, Chapter 11, specifically exempts appellant from draft in time of war except for the performance of duties such as required by his license, it was self-executing. The Selective Service Director, its officers and draft board members had announced their interpretation of 46 *USCA,* sec. 225, Chapter 11, with respect to the Selective Service Act of 1948, and they still insist upon it here [Tr. pp. 12, 13, 20, 23-26].

In appellant's opinion the Selective Service regulations have no bearing upon the issue here presented, and also in appellant's opinion the Selective Service Act of 1948 provides no administrative remedy where the question is, as here, a question of exemption from draft in time of war except for the performance of duties such as required by his license. Therefore an attempt to secure relief by resort to the so-called administrative remedies would clearly have been futile.

Koepke v. Fontecchio, supra;
Skinner & Eddy Corp. v. United States, supra.

Appellants also refer to their Argument I, above, and by reference make it a part of their argument hereunder.

In view of the foregoing the District Court erred in concluding that it had no jurisdiction to review the draft board's findings and order of induction because appellant had not taken the administrative appeal from his classification by the local board.

III.

A Draftee Who Has Undergone Induction Into the Military Service, May by Habeas Corpus Proceedings, Obtain a Judicial Review of the Legality of His Detention in the Military Service of the United States on the Grounds That He Is Being Detained Contrary to and in Violation of the Provisions of 46 USCA, Sec. 225, Chapter 11, Even Though Prior to His Induction the Draftee Failed to Take an Administrative Appeal From His Classification by the Local Board.

Assuming, but not conceding, that under the Selective Service Act of 1948, and the Selective Service Regulations, no authority exists for drafting appellant in time of war "for the performance of duties such as required by his license." In such case the controversy would not be between appellant and the local board, but the issue would be solely one between appellant and the military authorities.

The question then is whether appellant is being illegally detained in the military service of the United States because he is not performing duties such as required by his license and not receiving the highest rate of wages paid in the Merchant Marine of the United States for similar services, as provided by 46 *USCA,* sec. 225. Chapter 11.

Manifestly, the Selective Service Regulations have no bearing upon the issue here presented and the Selective Service Act provides no administrative remedy in a situation such as this.

Koepke v. Fontecchio, supra;
Skinner & Eddy Corp. v. United States, supra.

Appellants also refer to their Arguments I and II, above, and by reference makes them a a part of their argument hereunder.

In view of the foregoing the District Court erred in concluding that it had no jurisdiction to review the draft board's findings and order of induction because appellant had not taken the administrative appeal from his classification by the local board.

VII.
Conclusion.

Appellants respectfully submit for the reasons given hereinabove, as follows:

1. Appellant who has undergone induction, may by *habeas corpus* proceedings, obtain judicial review of the legality of his classification and induction on jurisdictional and constitutional grounds even though prior to his induction he failed to take an administrative appeal from his classification.

2. The issue under Argument II is solely one which involves an interpretation of 46 *USCA,* sec. 225, Chapter 11, with respect to the Selective Service Act of 1948; the Selective Service Regulations have no bearing upon the issue herein presented; and the Selective Service Act of 1948 provides no administrative remedy in a situation such as this.

3. The issue under Argument III is solely one between appellant and the Military Authorities of the United States, and not between appellant and the local board; the Selective Service Regulations have no bearing upon the issue herein presented; and the Selective Service Act of 1948 provides no administrative remedy in a situation such as this.

Respectfully submitted,

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Attorney for Appellants.